

92-266 RECEIVED

APR 15 1994

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Request for Declaratory Ruling)
Regarding the Multiplexing and) **SUNSHINE PERIOD**
Negative Option Provisions of)
the Commission's Rules)

To: The Commission and Managing
Director

**OPPOSITION TO "MOTION TO STRIKE
AND TO IMPOSE SANCTIONS"**

Showtime Networks Inc. ("SNI"), by its attorneys, hereby opposes the "Motion to Strike and to Impose Sanctions" filed April 6, 1994 by Encore Media Corporation ("Encore"). As shown below, notwithstanding its vituperative rhetoric, Encore's contention that SNI's March 17, 1994 "Request for Declaratory Ruling" violated the rules governing ex parte communications is without merit.

The issue raised in SNI's declaratory ruling request concerned the definition of "multiplexed or time shifted" programming as that term is used in Section 76.901(b)(3) of the Commission's rules. Contrary to Encore's claims, this question had not been placed at issue in the reconsideration proceedings in MM Docket No. 92-266 -- by Encore or any other party -- in any timely filing. Thus, SNI reasonably (and correctly) believed that its request for guidance was outside the scope of the proceedings on reconsideration. Indeed, the Commission itself has stated that questions concerning the definition of "multiplexed services" will be addressed in a

separate proceeding, as SNI proposed. Accordingly, Encore's Motion to Strike should be denied.

I. Background

The following brief chronology of events relating to this matter serves to place SNI's declaratory ruling request and Encore's filings in a proper context, and to demonstrate that SNI acted appropriately and in full accord with the Commission's Rules.

April 1, 1993 -- The FCC adopted its initial Report and Order in MM Docket No. 92-266.¹ In so doing, it exempted "multiplexed or time shifted" programming from rate regulation. The text of the Commission's decision was released on May 3, 1993.

June 21, 1993 -- 53 parties (including SNI's parent, Viacom International Inc., and Encore) filed timely petitions for reconsideration of the Rate Order. None of these parties raised the question of the definition of "multiplexed or time shifted" programming.

June 29, 1993 -- The Commission issued a Public Notice of the filing of these petitions for reconsideration.

August 2, 1993 -- The pleading cycle with respect to the petitions for reconsideration closed. Again, to SNI's knowledge, no party raised a question concerning the definition of "multiplexed or time shifted" programming.

February 14, 1994 -- Encore conducted a series of ex parte meetings with FCC personnel asserting its position with respect to "multiplexed or time shifted" programming.

February 15, 1994 -- On the same day that the FCC issued a "sunshine notice" with respect to its reconsideration of MM Docket No. 92-266, Encore submitted written notification of its February 14, 1994 meetings -- together with a 2-page statement of a proposed clarification of the multiplexing rule -- as an ex parte filing in MM Docket No. 92-266.

¹ Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) ("Rate Order").

February 22, 1994 -- The Commission completed its reconsideration of MM Docket No. 92-266 in an open meeting. The News Release describing the action made no mention of the multiplexing/time shifting issue.

March 17, 1994 -- SNI submitted its Request for Declaratory Ruling.

March 30, 1994 -- The Commission released the text of its Second and Third Orders on Reconsideration in MM Docket No. 92-266. It stated that, with the exception of leased access questions, these decisions "resolve[d] pending petitions for reconsideration of the [April 1, 1993] Rate Order."² It also stated that questions relating to the definition of multiplexed services would be resolved in "a separate proceeding."³

April 7, 1994 -- The Commission issued a Public Notice inviting comment on SNI's Request.⁴

In addition, on April 6, 1994, Encore filed its motion to strike against SNI. In essence, Encore claims that by its eleventh-hour ex parte presentation to the Commission -- literally on the eve of the sunshine period -- it unilaterally expanded the scope of the reconsideration proceedings to include an issue that had not been raised in a timely filing by Encore or any other party. Further, Encore asserts, the release of the sunshine notice on the very day Encore filed its ex parte notification effectively barred any other party from addressing this issue. As shown below, however, the Commission was correct in its determination that the "multiplexed services" issue is outside the scope of the

² Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38 (rel. Mar. 30, 1994), at 5 n. 3 ("Second Order on Reconsideration")

³ Id. at 96, n. 261.

⁴ Public Notice, Report No. 986 (rel. Apr. 7, 1994), at 5.

reconsideration proceedings and should be resolved separately. Accordingly, Encore's contention that SNI violated the ex parte rules is baseless.

II. The Definition of "Multiplexed Services" Was Not Timely Placed in Issue in the Proceedings on Reconsideration in MM Docket No. 92-266

Encore alleges that SNI's Request for Declaratory Ruling concerning the definition of "multiplexed or time shifted" programming violated the Commission's ex parte restrictions by "impermissibly arguing the very issues" that Encore attempted to raise in its eleventh-hour presentation to the Commission's staff. See Encore Motion at Summary and 1-4. However, as indicated above, the questions that are the subject of SNI's declaratory ruling request were not at issue in the recently concluded reconsideration proceedings. Indeed, the documents that defined the scope of those proceedings -- the reconsideration petitions and the Commission's own pronouncements -- made no mention of those issues.

To SNI's knowledge, the first and only reference to the appropriate definition of "multiplexed services" in connection with the MM Docket No. 92-266 reconsideration proceedings came in Encore's February 15, 1994 letter from counsel and attached "Recommended Clarifications to Paragraph 326 of Rate Report & Order, dated May 3, 1993, FCC 93-177." Encore's clarification request was submitted as a written summary of a presentation made by Encore the preceding day to decision-making personnel of the FCC. However, the Rate

Order had been released nearly nine months earlier, on May 3, 1993, and the deadline for petitions for reconsideration of that decision was June 21, 1993.

Encore elaborately claims that it "cleared its multiplex plan with the FCC, then publicly announced, explained, and promoted its multiplex plans in May 1993, and regularly thereafter, in industry trade publications, at national and regional industry conventions, in industry panel discussions and more." Encore Motion at 6-7. However, neither Encore's "plan" nor its interpretation of the legal basis for that plan was addressed in Encore's June 21, 1993 Petition for Reconsideration in MM Docket No. 92-266.⁵ Indeed, although Encore acknowledges ongoing contact with the Commission and its staff concerning its multiplex plans, the record in MM Docket No. 92-266 includes neither any pleading nor

⁵ Similarly, to SNI's knowledge, none of the other parties filing petitions for reconsideration in MM Docket No. 92-266 addressed the question of the appropriate definition of "multiplexed service" offerings.

Encore contends in its Motion that "Viacom International, Inc.'s Petition for Reconsideration [in MM Docket No. 92-266] expressly dealt with interpreting the 'cable programming service' definition." Encore Motion at 8-9 (footnote omitted). In fact, Viacom's reconsideration filing addressed only the ground rules for packaged offerings of several a la carte services. SNI's declaratory ruling request, by contrast, sought to clarify the circumstances under which a particular service would qualify for the separate exemption from rate regulation for "multiplexed services."

It is interesting to note that Encore's February 15, 1994 ex parte notice stated that, in addition to its request for clarification on the multiplexing issue, "[w]e also discussed the packaging of a la carte video program service offerings." Thus, Encore itself obviously recognizes the distinction between the two questions.

notification of any previous ex parte communications by Encore concerning the issue.⁶

Thus, it seems clear that, like SNI, Encore perceived the multiplexing issue to be outside the scope of the proceedings before the Commission on reconsideration in MM Docket No. 92-266. Only in February 1994, long after the deadline for submissions in the reconsideration proceedings, did Encore deem it appropriate to request "clarification" from the Commission within the context of MM Docket No. 92-266. SNI respectfully submits that Encore cannot be permitted to alter the scope of the reconsideration proceedings, nor to delimit the otherwise permissible and appropriate actions of other parties, by its unilateral decision, on the eve of the sunshine period, to seek "clarification" on an issue it had failed to raise in a timely fashion.

⁶ If Encore were correct in its assertion that the SNI filing was a prohibited ex parte contact in MM Docket No. 92-266, then it would logically follow that Encore itself violated the rules by failing to submit the required notifications of its earlier communications with the Commission on the same subject. As indicated in the correspondence with Commission officials attached as Appendix A hereto, Encore made both oral and written presentations and requested Commission "confirmation" of its "understanding of multiplex" long before its February 14, 1994 meetings. No filings by Encore concerning those presentations were recorded in MM Docket No. 92-266. For the reasons stated herein, however, SNI does not believe that either Encore or SNI acted improperly.

III. SNI Properly Raised Its Concerns With Respect to
"Multiplexed Services" in a Request for Declaratory
Ruling, Separate and Apart from the Pending
Reconsideration Proceedings

As shown above, the definition of "multiplexed services" was not a part of the pending reconsideration proceedings in MM Docket No. 92-266. SNI therefore appropriately determined that its request for clarification on that matter should be made through a request for declaratory ruling, as authorized by Section 1.2 of the Rules.

In its Second Order on Reconsideration, the Commission stated that its actions that day resolved all of the pending petitions for reconsideration, except for leased access issues. Second Order on Reconsideration, supra at 5 n. 3. The Commission also stated that questions regarding the FCC's definition of "multiplexed services" will be decided in a separate proceeding. Id. at 96, n. 261. SNI respectfully submits that the Commission's statements serve only to confirm SNI's understanding that the multiplex definitional issue was not a part of the reconsideration proceedings. Therefore, communications concerning that issue were not barred by the February 15, 1994 sunshine notice.

As the Commission stated in its Report and Order adopting the ex parte rules,

[t]he rules are not intended to interfere with the participation by parties to a restricted proceeding in other proceedings of a general or specific nature pending before the Commission. Nor are they intended to bar normal communication between decisionmaking personnel and attorneys (or other persons) who are pursuing the interests

of the same or other clients in nonrestricted proceedings or in other restricted proceedings.⁷

Similarly, SNI was fully within its rights in pursuing its concerns with respect to the multiplexing definition in a separate proceeding, and did not violate the Commission's ex parte rules by doing so.

IV. The Commission's Chosen Procedures Will Serve the Public Interest By Providing an Opportunity for Participation by All Interested Parties

SNI did not request that the clarification it sought be made in the FCC's decision in the pending reconsideration proceedings. Indeed, as reflected in footnote 3 (on pages 2-3) to SNI's March 17, 1994 Request, the Commission had already announced its decision on reconsideration in MM Docket No. 92-266 and in several related proceedings, weeks prior to SNI's filing.⁸ Rather, SNI sought clarification in a separate declaratory ruling proceeding in which it fully anticipated that Encore -- as well as any other interested parties -- would have the opportunity to submit comments.⁹

⁷ Rules Governing Ex Parte Communications, 1 FCC 2d 49, 57 (1965).

⁸ As noted above, the FCC's February 22, 1994 News Release (Report No. 2568) made no mention whatsoever of the "multiplexed service" question. Nor, to SNI's knowledge, was the issue raised at the Commission's open meeting.

⁹ Encore has complained that it was not served with SNI's filing. SNI is aware of no requirement, however, that a request for declaratory ruling be served on other parties.

Encore's last-minute ex parte notification, of course, was not served on other parties. Moreover, Encore's earlier presentations to the Commission on the "multiplexed services" definition -- which sought the equivalent of a declaratory

(continued...)

The question raised by SNI has not yet been resolved, and Encore should not be heard to claim prejudice merely because the Commission will deal with requests for clarification after other parties, too, have had the opportunity to make their views known.

By contrast, if the Commission were to accept Encore's position, any party could alter or expand the scope of a pending proceeding through an unsolicited presentation made long after the deadline for submitting petitions for reconsideration, and without prior notice to other participants. If, as here, the presentation were made shortly before the commencement of the pertinent sunshine period, other parties would effectively be barred from responding before the Commission disposed of the matter.

Encore's eleventh-hour request that its proposed "clarification" be made in the Commission's decision on reconsideration cannot be viewed as controlling on the FCC or other parties. Encore certainly is not entitled unilaterally to change the scope of the pending proceeding -- on the last day for public participation -- and deny other parties the right to utilize other available channels to raise their own concerns.

In determining the issues before the FCC on reconsideration, parties must necessarily rely on the

⁹(...continued)
ruling confirming Encore's position -- were neither recorded in the docketed proceedings, nor served on opposing parties. See Appendix A.

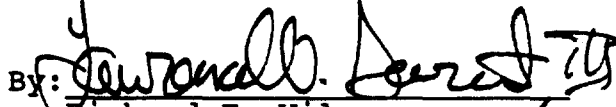
documents which the Commission has put on public notice that identify the scope of the proceeding. Those would include timely filed petitions for reconsideration as well as any pronouncements that may have been made by the agency itself. On that basis, SNI properly concluded that the "multiplexed service" question was not at issue and would not be resolved in the reconsideration proceedings, and therefore could appropriately be addressed in its declaratory ruling request.¹⁰

V. Conclusion

For the foregoing reasons, Encore's "Motion to Strike and to Impose Sanctions" should be denied.

Respectfully submitted,

SHOWTIME NETWORKS INC.

By: 

Richard E. Wiley
Lawrence W. Secrest, III
Philip V. Permut
Wayne D. Johnson
of

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1776 K Street, NW
Washington, DC 20006

Their Attorneys

¹⁰ Encore contends, finally, that SNI "[k]nows or [s]hould [k]now" that its claims concerning the merits of Encore's "Thematic Multiplex" are baseless. Encore Motion at 11. If Encore were as confident as it claims to be of the accuracy of its interpretation, however, there would seem to be no need for the "clarification" it seeks. Further, if it truly considered SNI's position to be baseless, Encore should welcome consideration on the merits, after an opportunity for comment by interested parties, rather than rely on contrived procedural arguments.

APPENDIX A

BARAFF, KOERNER, OLENDER & HOCHBERG, P. C.

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June 2, 1993

OF COUNSEL
ROBERT BENNETT LUBIC

FAX: (202) 686-6262

Via Hand Delivery

Ms. Alexandra Wilson
Mr. William Johnson
Federal Communications Commission
1919 M Street, NW, Room 819
Stop Code: 1800
Washington, D.C. 20554

RE: Encore and Multiplexing

Dear Sandy and Bill:

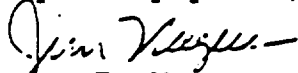
On behalf of John Sie, we wanted to thank you for taking the time to review John's understanding of multiplex reflected in his oral and written presentation of May 14 and in his follow-up letter of May 17. As you know, we took your suggestion and also discussed the matter with each of the Commissioners' legal advisors, John C. Hollar, Robert E. Branson and Robert Corn-Revere. We met with each of them on May 20, 1993, and left them the enclosed analysis of HBO's 1991 description of its multiplex plans.

Thank you for the suggestion. We obtained confirmation from each of the legal advisors who agreed that Encore's proposed multiplex plans were consistent with both the letter and spirit of the FCC's Report and Order in MM Docket No. 92-266.

Again, thank you for your time and courtesy.

If you have any questions or need anything further, please let me know.

Very truly yours,


James E. Meyers
Counsel for
Encore Media Corp.

Enclosure

cc: John C. Hollar
Robert E. Branson
Robert Corn-Revere

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D. JAY BARAFF
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June 2, 1993

Via Hand Delivery

OF COUNSEL
ROBERT BENNETT LUBIC

FAX: (202) 686-6262

Mr. Robert Corn-Revere
Legal Advisor
Office of the Acting Chairman
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, D.C. 20554

RE: Encore and Multiplexing

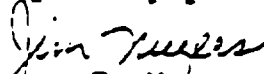
Dear Bob:

John Sie really appreciated the time that you and your colleagues took with him to confirm that his thematic multiplex plans for offering a tier of premium multiplexed services comports with the Commission's definition of a per channel, per program service offering.

John thought you and your colleagues might be interested in Encore's press releases announcing the roll out of the thematic multiplex channels we discussed at our May meetings. You can see how Encore has taken the most popular themes on ENCORE and multiplexed them into separate channels, each with a thematic focus. As John mentioned, he is particularly proud of Encore 4, the TWEENS channel, where, as a public service, it will offer 40-hours a week of real-time instructional programming during school days (separate press release). A description of the technology that we discussed is also enclosed.

Again, thanks for your time and consideration.

Very truly yours,


James E. Meyers
Counsel for
Encore Media Corp.

Enclosure
cc with enclosures:
Robert Branson
John Hollar
Sandy Wilson
Bill Johnson

JZM/mcl c:\wp\26108\fccltr.62



John J. Sie
Chairman
Chief Executive Officer

May 17, 1993

VIA FAX:

Ms. Alexandra Wilson
Special Assistant to the Bureau Chief for Cable
Mass Media Bureau

Mr. William H. Johnson
Deputy Bureau Chief
Mass Media Bureau

Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20054

Dear Sandy and Bill:

Given your busy schedule, we really appreciated the time you gave us to share our views on rate regulation in general and our plans for multiplexing in specific.

Again, we have nothing but the greatest admiration for you and the team you led in putting forth the various Reports and Orders on the Cable Act. I don't know how you do it, given the task itself, plus so many diverse and often conflicting views all being conveyed in the name of "public interest."

We certainly appreciated the Commission pro-actively addressing and clarifying the exemption of multiplexed premium channel tiers from "cable programming service."

There are two points that I'd like to amplify following our meeting last Friday.

1. The Commission both in its NPRM and the R&O used the phrase "multiplexed or time shifted" to indicate time shifting as a subset or an example of multiplexing ("time shifting" was never used in the House Report). This leads me to believe that perhaps the Commission thought "time shifting" was the predominant method in the multiplex experiment that Congress referred to. As we stated, HBO's multiplexing strategy is (1) to counterprogram the multiplexed channels to the main HBO to target different audiences during the same daypart, e.g., male, female, kids, teens, etc. and (2) to offer more and different titles. I have attached a copy of HBO's multiplex brochure for December, 1991 for your reference.

Denver Office
4700 South Syracuse Parkway, Suite 1000 • Denver, CO 80237
(303) 771-7700 • FAX (303) 741-3067

Below is a summary title analysis showing the trend in increasing different titles of the HBO multiplex from the launch period to today.

	Launch Phase <u>(9/91)</u>	Current <u>(5/93)</u>
All Dayparts		
HBO Titles	112	113
Unduplicated Titles on HBO2,3	40	52
Primetime		
HBO Titles	36	46
Unduplicated Titles on HBO2,3	43	77

I suppose that technically and theoretically, the HBO multiplexed programming is "time shifted" inasmuch as all of the programming on the multiplexed channels are either produced or licensed by HBO, Inc. to be exhibited on HBO or its multiplexed channels. But within any month (and all the premium services, including ENCORE, are monthly subscription services) time shifting is merely a by-product of exhibiting duplicated titles.

Of the four premium services that have multiplexed, only Showtime uses time shifting as its programming model.

2. The House Report made clear that Congress intended not only to exempt "multiplexed" premium services from being regulated as a "cable programming service" tier, but also to extend such exemption to future multiplexing of traditional [existing] per-channel premium services like ENCORE which had not yet multiplexed last October when the Cable Act was passed. Page 90 of the House Report states:

• House Report p.90

"... it is the intent of the Committee that "multiplexed" premium services such as HBO 1, HBO 2, and HBO 3 also be excluded from the term "cable programming service." The Committee does not intend that the trend toward offering multiple channels of commonly identified video programming, that traditionally or historically were offered on a per-channel or stand alone basis, should result in an otherwise exempt service becoming subject to rate regulation."

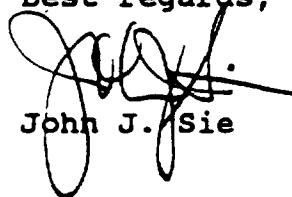
Certainly the Congressional intent was to grant all existing premium services the exemption for multiplexing. It is silent on new entrants with regard to such exemption. It would seem that the Commission would have the regulatory authority to prevent any potential abuse by someone to claim multiplex of otherwise regulated tiered services.

In closing, ENCORE lives in an extremely competitive world against all other existing premium services who have multiplexed. They are all much larger entities with much larger distribution and with tremendous market power.

We believe that ENCORE's multiplex approach by themes is a better marketplace solution than our competitors' multiplex model. We have to be more creative to sustain our growth. By providing our viewers with what we believe is a more appealing approach, we are satisfying the Congressional intent of offering more diverse programming choices to the American public within a robust competitive free-market environment.

Thank you again for your time. We would appreciate you treating our multiplexing plans with some discretion as we have not yet announced them to the public (hope to do it very shortly).

Best regards,



John J. Sie

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1994, I caused copies of the foregoing "Opposition to Motion to Strike and to Impose Sanctions" to be mailed via first-class postage prepaid mail to the following:

Yvonne Bennett
Director, Business Affairs and General Counsel
Encore Media Corporation
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James E. Meyers, Esquire
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, NW
Washington, DC 20015-2003



Ellen Hishta